PUBLIC PROSECUTOR v. ELLERY

[A. Cr. J. (Pretheroe J.) January 9, 1956]

[Ipoh — Criminal Appeal No. 73 of 1955]

Motor Vehicles (Driving Offences) Proclamation, s. 6(1) and Proviso — Charge of driving vehicle whilst under influence of drink — Charge amended to being found sitting in the driving seat of the vehicle under influence of drink — Defence that accused had no intention of driving — Relevant intention is intention at the time of being found sitting in the driving seat of the vehicle.

In this case the respondent was originally charged with driving a vehicle whilst under the influence of drink to such an extent as to be incapable of having proper control of the said vehicle contrary to s. 6(1) of the Motor Vehicles (Driving Offences) Proclamation. At the end of the prosecution case, the prosecuting Inspector was given permission to amend the charge to one of being found sitting in the driving seat of the motor vehicle whilst under the influence of drink to such an extent as to be incapable of having proper control of the said vehicle. The respondent in his evidence said that while he was driving the car he struck a culvert at or very near to a bend in the road. After the accident he descended from the car and examined the damage done to its rear after first having switched off the ignition. He then returned to the front of the car and turned off the car lights. It was at that moment that the policemen arrived. The learned Magistrate found that the defendant had proved that he had no intention of driving the vehicle and he therefore acquitted him. The Public Prosecutor appealed. On appeal it was argued that the defendant himself had admitted driving the car to the scene of accident and therefore the proviso to s. 6 did not apply.

Held: the intention to which the proviso refers is the intention entertained at the time the person is found sitting in the seat and on the facts the learned Magistrate had rightly acquitted the accused.

Case referred to:—

(1) *Jowett-Shooter v. Franklin* (1949) 2 All E.R. 730.

MAGISTRATE'S CRIMINAL APPEAL.

T. R. Hepworth (Federal Counsel) for the appellant.

P. Hall for the respondent.

Pretheroe J. : — This is an appeal by the Public Prosecutor against an order of acquittal made by the learned Magistrate of the Ipoh Court. The defendant was originally charged with driving a vehicle whilst under the influence of drink to such an extent as to be incapable of having proper control of the said vehicle contrary to section 6(1) of the Motor Vehicles (Driving Offences) Proclamation. After seven witnesses had given evidence the prosecution case was closed. Mr. Rintoul, who appeared for the defence in the Lower Court, then invited the Court to acquit the defendant on the ground that there was no evidence that the defendant had driven, or even attempted to drive, the vehicle. Thereupon the prosecuting Inspector asked for a short adjournment to enable him to consider the position. On the resumption the Inspector applied for permission to amend the charge. This was granted and the substituted charge read as follows :—

"That you at about 9.05 p.m. 3/4/55 at Golf Club Road Ipoh were found sitting in the driving seat of motor car No. SF. 5032 whilst under the influence of drink to such an extent as to be incapable of having proper control of the said vehicle and thereby committed an offence punishable under s. 6(i) of the M.V. (Driving Offences) Proclamation No. 42/46."

In view of the ground of appeal I draw attention to the words "found sitting in the driving seat" as there is nothing in the section about being "found" though there is in the proviso to the section. Also the offence is alleged to have been committed "at about 9.05 p.m." This is the time at which two volunteer members of the Traffic Branch Police believe they arrived at the scene of the motor accident as they had no watches.

Mr. Rintoul again invited the Court to acquit the defendant on the ground that some of the necessary ingredients of the offence had not been proved and consequently the evidence, if unrebutted, would not warrant the conviction of the defendant.

The Court then adjourned to consider this submission.

The following day the learned Magistrate read a long decision on the point and decided that there was sufficient evidence to warrant a conviction if unrebutted.

The defendant then elected to give evidence. It was to the effect that, on the night in question, he drove his car from a house in Tiger Lane and was proceeding along Golf Course Road when he struck a culvert at, or very near to, a bend in the road. He asserted that he left the house in Tiger Lane at "about 8.30 p.m. approximately" and had driven approximately 1½ miles when the accident occurred. Afer the accident he descended from the car and examined the damage done to its rear after first having switched off the ignition. He found several parts of the car were damaged and that petrol was leaking from the tank on to the road. Fearing that the petrol might become ignited defendant stated that he returned to the front of the car and turned off the car lights and it was at that moment that the two Traffic Branch police arrived. This item of his evidence was corroborated to some extent by the evidence of one of the constables who had deposed that when they arrived on the scene the car "had no lights on at all."

The defence was that, after the accident, defendant had no intention of driving, or attempting to drive, the vehicle even if it were held that he had been "found sitting in the driving seat."

The learned Magistrate found that defendant had proved "that he had no intention of driving the car

from approximately 8.35 p.m. or 8.40 p.m. to 9.05 p.m." and therefore acquitted him. The Public Prosecutor appealed against this finding on the ground that it was bad in law.

At the hearing of the appeal Mr. Hepworth appeared for the appellant and Mr. Hall for the respondent. The basis of the appellant's case was that the learned Magistrate had negatived any intention on the defendant to drive his car during a stated period of one half-hour but the defendant himself in his evidence had admitted that he drove the car from Tiger Lane to the scene of the accident. Mr. Hepworth submitted that the wording of the charge ("at about 9.05") was sufficiently broad to cover the seconds before the accident when, on his own admission, defendant obviously had the intention to drive. He further submitted that the proviso to section 6 of the Proclamation was never intended to apply to a case where a person had actually driven his car but had come to a halt: it was intended to cover cases such as *Jowett-Shooter v. Franklin*[1].

On behalf of the respondent Mr. Hall made two submissions. The first was that on the prosecution evidence the learned Magistrate should never have called upon the defence. I disagree with this submission. Two witnesses had stated that they saw, as they thought, the defendant get out of the car by the door next to the driver's seat and there was no other person either in the car or in sight in the immediate neighbourhood. In these circumstances I consider that the fact that defendant had been sitting in the driver's seat was so probable that a prudent man would accept it as proved. The second submission had, in my opinion, a great deal more substance. It was that the intent to drive, mentioned in the proviso to section 6, means the intent at the time when found sitting in the driving seat and not any intention formed half an hour, or any other period of time, earlier.

Mr. Hepworth countered this with the submission that the proviso could never have been intended to produce a situation in which a defendant can say "I admit I was driving my car when the accident occurred but from that moment I have had no intention of driving any further." But this is not a complete answer in my opinion. In the circumstances described, if the prosecution could prove that defendant was sitting in the driving seat at the time of the accident, the same evidence would presumably be adequate to prove that defendant was driving the vehicle and he would have been so charged.

No local precedent was cited and I have been unable to find one. Also, no assistance can be derived from English cases as the various Road Traffic Acts contain no similar provision. In those Acts the offence is being "in charge of a motor vehicle." In these circumstances it is my duty to construe the proviso by giving the words therein appearing their ordinary grammatical meanings.

In my opinion the portion of the section referring to "sitting in the driving seat" is intended to refer primarily to the case of a stationary car. If the car is in motion then the provision relating to driving is applicable. For this reason I am of opinion that the intention to which the proviso refers is that entertained at the time the person is found sitting in the seat. For this reason I dismiss the appeal and will only add that I am in agreement with a remark made by Mr. Hepworth to the effect that the charge in this case should not have been altered.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.*

REG. v. CHAN CHOON WENG & ORS.

[A. Cr. J. (Spenser Wilkinson J.) January 12, 1956]

[Penang — Criminal Appeal Nos. 63 & 64 of 1955]

Criminal Procedure Code (Cap. 21), s. 416(1) — Offence punishable with death or life imprisonment — Bail.

The respondents in this case were charged with gang robbery under s. 395 of the Penal Code. The learned Magistrate released the respondents on bail and said in his grounds of judgment: "In the case under consideration the offence is not punishable with death or penal servitude for life."

Held: as gang robbery under s. 395 of the Penal Code is punishable with life imprisonment, the learned Magistrate had no power to grant bail under s. 416(1) of the Criminal Procedure Code.

D. C. Jackson (Sr. Federal Counsel) for the appellant.

Respondents in person.

Cases referred to:—

(1) *Re K. S. Menon* (1946) M.L.J. 49.

(2) *R. v. Ooi Ah Kow* (1952) M.L.J. 95

Spenser Wilkinson J. : — These two appeals were heard together as the same point arose in both and indeed there is now really only one case. All the five respondents were charged in the Magistrate's Court with gang robbery under section 395 of the Penal Code and although the first three respondents were apprehended earlier than the other two on the 19th December, 1955 a preliminary enquiry was fixed for the 9th February, 1956 in respect of all five respondents and the learned Magistrate acceded to their application for bail. Against the Order of the learned Magistrate releasing the respondents on bail the Crown appealed.